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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE Plaintiff and Respondent, v. JORGE SERRATO, Defendant and Appellant.	B286911 (Los Angeles County Super. Ct. No. VA132086-01)

APPEAL from a judgment of the Superior Court of Los Angeles County. Roger Ito, Judge. Affirmed.

Tracy J. Dressner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William H. Shin and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found appellant Jorge Serrato guilty of the first degree murder of a 19-year-old college student who was selling marijuana illegally. The jury found true the gang enhancement—that Serrato committed the crime for the benefit of or at the direction of a criminal street gang—and the firearm enhancement—that Serrato personally and intentionally discharged a firearm, causing great bodily injury and death. He appeals the trial court's judgment of conviction and sentence, alleging the following: (1) the trial court committed reversible error when it omitted a critical factor while instructing the jury on how to evaluate witness credibility; (2) his trial attorney provided ineffective assistance of counsel because she failed to object to hearsay testimony; and (3) the cumulative effect of the two alleged errors in (1) and (2) require a reversal of conviction. Serrato also requests that this court review transcripts in the sealed court exhibit to determine whether the trial court erred in its ruling that the defense was not entitled to review the proffer statement made by a co-defendant; we have reviewed the sealed court exhibit and find no error. In all respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In an Amended Information filed January 24, 2017, Jorge Serrato (hereinafter Appellant) was charged, along with Daisy Jimenez, Edward Almanza, Jr., and Jessica Reyes, with the crime of murder in violation of Penal Code,[1] section 187(a). It was further alleged the crime was committed for the benefit of or

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[1] All further statutory references are to the Penal Code, unless otherwise stated.

at the direction of a criminal street gang in violation of section 186.22, subdivision (b)(1)(C). It was further alleged that Appellant personally and intentionally discharged a firearm which proximately caused the death of the victim in violation of section 12022.53, subdivisions (d) and (e)(1). The information also alleged that Appellant had a prior serious felony strike conviction within the meaning of section 667, subdivisions (a)(1) and (d)(1) and that he had served a prison term for a prior conviction per section 667.5, subdivision (b).

Appellant pled not guilty and denied all allegations. Appellant and Almanza were tried together before separate juries. Almanza's jury hung on the murder count and the court ultimately declared a mistrial.

The jury convicted Appellant of first degree murder and found true the firearm and gang enhancements. The trial court sentenced him to a total term of 55 years to life, which included: 1) five years for his prior strike; 2) 25 years to life on the murder conviction; and 3) a consecutive 25-year-to-life term for the firearm allegation.

Appellant timely appealed.

The murder victim was Cyrus Alva. Cyrus, a 19-year-old Long Beach City College student, lived with his parents and older brother Suraj Alva[2] at their family home in Lakewood, California. Cyrus was a drug dealer who bought marijuana from clinics and re-sold it. On May 29, 2013, Appellant and his girlfriend Daisy Jimenez met defendants Edward Almanza, Jr. and his girlfriend

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[2] Brothers Cyrus and Suraj share the same last name. We refer to them by their first names to avoid confusion.

Jessica Reyes at Reyes's residence, and discussed "tax"-ing[3] Cyrus and/or robbing him of his marijuana. Almanza previously told Reyes he wanted to rob Cyrus because Cyrus made a lot of money selling marijuana. Almanza instructed Reyes to contact Cyrus and act as though she wished to purchase marijuana. Reyes and Cyrus exchanged text messages, and Cyrus told Reyes where she could meet him to purchase marijuana.[4]

The following day, Jimenez drove herself, Reyes, Almanza, and Appellant in her white, four-door Suzuki to Cyrus's home and parked nearby. Appellant and Almanza exited the vehicle; according to Reyes, Appellant immediately went to the trunk of the vehicle and retrieved a "black lunch pail type of bag." They approached Cyrus, who was seated on the porch. Suraj was inside the house at the time, and heard someone from outside ask, "What the fuck is up then?"; this caused Suraj to open the door to check on Cyrus, and saw Almanza and Appellant—"dressed like gangbangers"—standing in front of Cyrus. Suraj shut the door "but [he] knew that something was wrong and [that he] would have to get into a fight pretty soon because it just—it's intuition."

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[3] "[I]t's almost like a street tax" and "if you're going to sell drugs and you're not a part of our gang, we're going to tax you and we're going to get a portion of that money. That money funnels up to the higher train [*sic*] of command."

[4] Cyrus's cellular phone was later discovered, and contained both call and text records from Reyes's cellular phone.

Moments later, Suraj heard a "scuffle going on outside" and rushed out to find Almanza and Cyrus in a physical altercation. Cyrus told Suraj "to go back inside and close the door," but Suraj did not listen to him. According to Suraj, Appellant—who was standing a few feet away—shot Cyrus in the head and killed him,[5] while Almanza "just start[ed] running away." After hearing the gunshot, several neighbors saw Almanza and Appellant flee, running to a white car (i.e., Jimenez's vehicle). A few neighbors also heard Suraj yell, "They shot my brother." Suraj "ran back inside the house" and "called 911, [and] told them that he'd been shot." Suraj never saw a gun.

According to Reyes, while running back to the vehicle, Appellant was holding the front of his waistband "in a funny way." Once Appellant and Almanza returned to Jimenez's vehicle, Appellant told Jimenez "to hurry up and go . . . telling [Jimenez and Reyes] to shut up and be quiet." According to Reyes, Almanza asked Appellant "why did [you] do that" and Appellant had responded, "because [Cyrus] made him mad."

Almanza and Reyes later went to the beach together. He told her that he and appellant had ordered Cyrus to pay them every week. Although Cyrus agreed to do so, he had allegedly refused to allow Almanza or Appellant to enter his house; Cyrus allegedly told Almanza and Appellant, "I'd rather let you kill me than let me make you come in and see my shit."

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[5] Suraj described his brother "on the floor with blood coming out from his throat area." Cyrus died from the single gunshot wound to the right side of his chin, which struck a major blood vessel to his brain.

Reyes identified Almanza to be a member of the East Side Wilmas gang, who went by the moniker "June Bug" and/or "Kilz" Reyes identified Appellant as going by the moniker "Risky."

Jimenez identified Appellant as an East Side Longo gang member who went by the moniker "Frisky." She identified Almanza as going by the moniker "Killz." Jimenez stated that appellant confessed to her that he was the one who shot and killed Cyrus; apparently, Appellant had "gotten mad" at Cyrus because he was not complying with his and Almanza's demands.

On August 29, 2013, Appellant was placed in a wired jail cell with two undercover officers who were dressed as gang members. Appellant told the undercover deputies that he used the moniker "Kilz" when he went to tax people.[6] He described the victim as an "Arab fool" who attended Long Beach City College and sold some "major shit." Appellant said "Tio" directed them to go and "tax" Cyrus; when Cyrus failed to cooperate, a fight ensued and, according to Appellant, the "lil' homie" i.e., Almanza, shot the victim. Appellant then snatched a bag of some "wild-ass weed" that belonged to Cyrus.

On June 24, 2014, Suraj was brought to view a live line-up, and identified Appellant as the shooter; he identified Appellant as the shooter two more times—once at the preliminary hearing and also during trial.

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[6] The undercover deputies asked appellant about the street name, Kilz: "That's your homie's name? Is that what he goes by in the street?" Serrato replied, "No, that's what I go by, like, in the street, you know what I mean." Appellant explained that he has "got an ak [*sic*] name for the street and one when [the police] pull [him] over."

However, Suraj was unable to identify Appellant or Almanza when presented with six-packs of photos which contained photos of both. When interviewed by law enforcement, Suraj also failed to mention Almanza's arm tattoos or Appellant's face and neck tattoos.

Suraj told the jury he suffered from progressive degenerative myopia, meaning he cannot see things "distance[-]wise"; at the time of the shooting, Suraj had 20/80 vision. Suraj explained that his degenerative eye disease caused him difficulty when attempting to identify individuals by photograph rather than in person.

At trial, Long Beach Police Officer Chris Zamora, the People's gang expert, testified that gang members are "given a moniker. A nickname. Something that represents you for the gang." Officer Zamora explained it is common for gang members to have more than one moniker—one that they use in the streets and one that they use when encountering law enforcement. Officer Zamora also explained that if a gang member were to tax a drug dealer, he would typically take another gang member with him as support and that second gang member would bring a gun.

In August 2013, defendant Reyes initially denied knowing anything about Cyrus's death. Reyes was questioned again in December 2013 and January 2016. Reyes had not received an offer after the first two times she was questioned. After her January 2016 proffer, the People offered Reyes a 13-year sentence in exchange for her guilty plea to voluntary manslaughter with a gang enhancement and her voluntary testimony at trial. This was a significant reduction as Reyes was initially charged with first degree murder, facing the possibility of life in prison. At trial, Reyes admitted she told a cellmate that

she would snitch on people she did not care for or would make things up to get out of custody.[7]

DISCUSSION

A. *APPELLANT CLAIMS THE TRIAL COURT ERRED WHEN IT GAVE WHAT APPELLANT ARGUES WAS AN INCOMPLETE VERSION OF CALCRIM NO. 226.*

Appellant contends the judgment should be reversed because the trial court failed to instruct the jury about a factor affecting witness credibility—whether a witness was promised leniency in exchange for her testimony. (See CALCRIM No. 226.) We disagree.

The trial court gave CALCRIM No. 226, which informs the jury of its duty to decide whether a witness is credible, and instructs them to use their common sense, experience, and "anything that reasonably tends to prove or disprove the truth or accuracy of [the witness's] testimony." The court did not include optional language telling the jury that in judging the credibility of the witnesses, it may consider: "[W]as the witness promised immunity or leniency in exchange for his or her testimony?"

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[7] Reyes was recorded on January 10, 2014 as having said, " 'I'm going to tell the fucking prosecutor. I will do anything to get out of here. I will do anything. Like I will snitch on whoever. I don't give a fuck. I don't. But I just make shit up. I'll just snitch on people I don't like.' "

(*Ibid.*) Appellant did not object to the instruction as given and did not propose the addition of this optional language.[8]

Appellant assets the trial court had a sua sponte duty to instruct on factors relevant to a witness's credibility pursuant to CALCRIM No. 226. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884.) Appellant notes Reyes—a key witness facing a life sentence for murder—was allowed to plead guilty to voluntary manslaughter with a sentence of 13 years in exchange for testifying for the prosecution against Appellant and Almanza. She provided critical evidence about appellant and Almanza, including: (1) that right after they returned to Jimenez's vehicle, Almanza asked appellant why he "did it," to which appellant replied, "because he made [me] mad"; (2) that later in the day of the shooting, Almanza told Reyes at the beach that appellant shot Cyrus after Cyrus and Suraj attacked Almanza.

"We review de novo a claim that the trial court failed to properly instruct the jury on the applicable principles of law." (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 850.) "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and

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[8] The Attorney General claims appellant forfeited his contention because he did not request the instruction at trial. But defendants may assert instructional error for the first time on appeal if the error affected their substantial rights. (*People v. Gamache* (2010) 48 Cal.4th 347, 375, fn. 13; see §§ 1259, 1469.) Thus, to the extent any instructional error contributed to appellant's conviction and sentence, we may review it. (*Gamache*, at p. 375, fn. 13.)

which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

Here, the portion of the instruction Appellant argues the trial court had a sua sponte duty to give is an optional or "bracketed" witness credibility factor that *may*—not *must*—be included based on its relevance and the evidence presented. (CALCRIM No. 226; *People v. Horning* (2004) 34 Cal.4th 871, 910.) Nothing in *People v. Rincon-Penda,* nor any other case cited by Appellant, requires the inclusion of the bracketed factor on immunity in the trial court's witness credibility instruction. Nor are we aware of any such authority requiring inclusion of this factor under similar circumstances.

Nonetheless, were we to deem the omission of the bracketed credibility factor from CALCRIM No. 226 to constitute error, we would find such error harmless. The jury was well-aware that Reyes received leniency in exchange for testifying for the prosecution. Reyes was cross-examined about her "agree[ment] to make a statement to the D.A. in an exchange for an offer of leniency." At the time she made that statement to the District Attorney's Office, Reyes had been in custody for "about three years" already. While on the stand, she admitted having gone to meet with the D.A. with the belief that if she "made a statement and if the D.A. thought it was helpful[,] that [she] might get an offer [of leniency]"; the jury heard this testimony by Reyes.

We also note that other instructions sufficiently informed the jury that Reyes's testimony should be viewed with caution. The jury was instructed to use its common sense and experience in assessing credibility; the jury was instructed to consider whether "the witness's testimony [was] influenced by a factor

such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided." (CALCRIM No. 226.) The jurors were thus free to draw whatever conclusion they wished to draw from the fact that Reyes received leniency in exchange for testifying for the prosecution. There is no prejudice concerning an omission in one instruction if another instruction remedies the omission. (See 5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Trial, §747, pp. 1164–1165.) As our colleagues in the First District of this court wrote: "There is no error in a trial court's failing or refusing to instruct on one matter, unless the remaining instructions, considered as a whole, fail to cover the material issues raised at trial. As long as the trial court has correctly instructed the jury on all matters pertinent to the case, there is no error. The failure to give an instruction on an essential issue, or the giving of erroneous instructions, may be cured if the essential material is covered by other correct instructions properly given." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277; see also *People v. Jeffries* (2000) 83 Cal.App.4th 15, 22.)

There was no error.

B. *APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON FAILURE TO OBJECT TO HEARSAY.*

Appellant contends his trial counsel was ineffective because she failed to object to hearsay testimony by Reyes about statements Almanza previously made to her. During trial, Reyes testified that while at the beach on the day of the shooting, Almanza told Reyes "they went over there to rob Cyrus. They asked—I guess they told him that he needs to give them money or—I guess they wanted to go in the house to get more—a bigger

amount of weed and that Cyrus wouldn't let them in the house. And then they started arguing, and Cyrus attacked [Almanza], and then the brother came out and I guess he attacked [Almanza] too and then—and then he said that [appellant] shot him. Shot Cyrus." Appellant argues his counsel's failure to object to Reyes's hearsay testimony constituted ineffective assistance of counsel.

To establish ineffective assistance of counsel, a petitioner must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688 (*Strickland*); *In re Jones* (1996) 13 Cal.4th 552, 561; *In re Wilson* (1992) 3 Cal.4th 945, 950.)

In evaluating a defendant's claim of deficient performance by counsel, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (*Strickland*, *supra*, 466 U.S. at p. 689; *In re Jones*, *supra*, 13 Cal.4th at p. 561), and great deference is accorded to counsel's tactical decisions. (*In re Fields* (1990) 51 Cal.3d 1063, 1069–1070.) Otherwise, "appellate courts would become engaged 'in the perilous process of second-guessing.' " (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

A defendant claiming ineffective assistance of counsel "must establish 'prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel. [Citation.] . . .' Prejudice is established if there is a reasonable probability that a more favorable outcome would have resulted

had the evidence been presented, i.e., a probability sufficient to undermine confidence in the outcome. [Citations.] The incompetence must have resulted in a fundamentally unfair proceeding or an unreliable verdict." (*In re Clark* (1993) 5 Cal.4th 750, 766.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." (*Strickland*, *supra*, 466 U.S. at p. 697.)

"Whether to object to inadmissible evidence is a tactical decision[, and] because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence." (*People v. Hayes* (1990) 52 Cal.3d 577, 621.) Accordingly, defendant's ineffective assistance of counsel claim is not well taken. (*People v. Price* (1991) 1 Cal.4th 324, 440.)

Moreover, notwithstanding Reyes's testimony about what Almanza told her, the testimony of Jimenez and Suraj established that Appellant, not Almanza, shot Cyrus. We are convinced there is no reasonable probability that the outcome of his trial would have been more favorable had trial counsel successfully objected to the admission of Reyes's hearsay testimony about Almanza's alleged out-of-court statements

incriminating appellant. We find no prejudice from trial counsel's failure to object.

C. *APPELLANT CLAIMS HE WAS PREJUDICED FROM THE CUMULATIVE EFFECT OF ERRORS.*

Appellant next argues that even if the trial court's instructional error and his counsel's ineffective assistance are harmless when viewed in isolation, the cumulative effect of such errors warrants reversal of his conviction. We are not persuaded.

"Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' [Citation.] When the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required." (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.)

Here, we have rejected appellant's claims of failure to properly instruct the jury on witness credibility and ineffective assistance of counsel. "We have identified no errors. In the absence of error, there is nothing to cumulate." (*People v. Duff* (2014) 58 Cal.4th 527, 562.)

D. *APPELLANT'S REQUEST THAT THIS COURT REVIEW THE SEALED PROFFER*

The trial court sealed the transcript of a proffer and declined to allow Appellant's counsel to review it. Appellant requests that this court conduct an independent review of the proffer in the sealed court exhibit to determine whether there is any information in the proffer that was "potentially exculpatory or material" that was not otherwise provided to the defense. The People did not object to Appellant's request.

We have examined the proffer in the sealed court exhibit and conclude it includes no exculpatory or other evidence material to Appellant's defense.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.